Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:TL-N-1790-01
MAYost

date: MAY 16 2001

to: Dan Callahan, Team Manager, LMSB:NR:1486

from: Associate Area Counsel, LM:MCT:CLE:PIT

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subject: **Statute of Limitations on [redacted] and [redacted] Refund Claims [redacted]**
U.I.L. Nos. 6511.03-03

Our National Office has modified the advice that we previously issued in our prior memorandum dated April 19, 2001. As previously indicated, our memorandum was subject to 10-day post review in the National Office and, therefore, was subject to modification.

We have received telephonic advice from the National Office indicating that while they agree that the Forms 1120X filed by [redacted] for [redacted] and [redacted] can not be construed as protective claims for refund, [redacted]. I.R.C. § 6511(d)(3)(A), in conjunction with § 901(a) and Treas. Reg. 1.901-1(d), provide that a taxpayer may elect to credit or deduct creditable foreign income taxes, and claim a refund or credit attributable to such taxes, at any time before the expiration of a special 10-year statute of limitations. If the Dutch tax at issue here, however, is determined not to be a creditable income tax, these provisions would not apply, since any claim for refund of taxes paid for [redacted] and [redacted] would not be "attributable to" foreign taxes "for which credit is allowed." In other words, these provisions apply to allow an election to deduct or credit the foreign taxes only if such taxes are creditable. Accordingly, the National Office is of the view that any refund claim of [redacted] attributable to a deduction for a non-creditable tax paid in [redacted] and [redacted] would be time-barred under the normal 3-year statute of limitations (as would any assessment of additional tax that might have been due by reason of such determination).

We did not address the mitigation rules in our prior memorandum. Given the National Office's conclusion that §6511(d)(3)(A) does not apply if the Dutch tax is determined not to be creditable, the National Office considered the potential

application of the mitigation provisions and reached the tentative conclusion that these provisions would not be available to the taxpayer. According to the National Office, the mitigation provisions are based on the principle that correction of the erroneous treatment of an item barred by the statute of limitations is only made where the subsequent determination involves the same item. See, Rev. Rul. 73-230, 1973-1 C.B. 374. Further, the mitigation provisions do not permit adjustments in barred years for items or transactions that are merely similar to those with respect to which a subsequent determination is made. See, Rev. Rul. 70-7, 1970-1 C.B. 175, citing D.A. MacDonald v. Commissioner, 17 T.C. 934 (1951), acq. 1952-1 C.B. 3. In our case, the National Office does not consider a deduction to be the same item as a credit. The disallowance of a credit in [redacted] for the claimed carryforward of a non-creditable tax for which deduction was not allowed in [redacted] and [redacted], therefore, would not come within the mitigation provisions. The National Office did caution, however, that this position is tentative, as other facts or arguments might alter its conclusion.

Of course, as you are aware, if the Dutch tax is ultimately determined to be creditable, the above issues become moot.

If you have any questions, please call Attorney Michael A. Yost, Jr. at (412) 644-3441.

Richard S. Bloom
Associate Area Counsel (LMSB)

By: Michael A Yost Jr
MICHAEL A. YOST, JR.
Senior Attorney (LMSB)

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Internal Revenue Service

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subject: **Statute of Limitations on [redacted] and [redacted] Refund Claims [redacted]**

U.I.L. Nos. 6511.03-03

This memorandum responds to your request for assistance dated March 16, 2001. This memorandum should not be cited as precedent. It is also subject to 10-day post review in the National Office and, therefore, is subject to modification.

ISSUES

1. Whether the Forms 1120X filed by the taxpayer for [redacted] and [redacted] should be treated as informal protective claims when the Forms 1120X report additional tax due?

2. Whether, if the Forms 1120X do not constitute informal claims for refund, the statute of limitations for filing claims for refund for the tax years [redacted] and [redacted] is still open under I.R.C. § 6511(d)(3)(A) to permit the taxpayer to deduct the Dutch profit share (SPS) taxes as foreign taxes paid or accrued in those years?

3. Whether, if the § 6511(d)(3)(A) statute is expired, the mitigation rules would apply under the circumstances of this case?

CONCLUSIONS

1. The Forms 1120X do not constitute protective claims for refund.

2. (b)(7)a [redacted].

3. (b)(7)a [redacted].

FACTS

On [redacted], [redacted] filed Forms 1120X for the tax years [redacted] through [redacted]. The amended returns were filed to treat the Dutch SPS tax as a fully creditable tax under I.R.C. § 901. On its original returns, [redacted] had deducted the Dutch SPS tax.

The Form 1120X for [redacted] reported an additional tax due of $[redacted], which was subsequently assessed. [redacted] paid the tax on [redacted]. For [redacted], the Form 1120X reported an additional tax due of $[redacted], which was also assessed. The [redacted] tax was paid on [redacted]. The additional taxes due for [redacted] and [redacted] were the result of an increase in the environmental tax. The additional foreign tax credits claimed for the Dutch SPS tax on the Forms 1120X could not be used to offset the environmental tax, but were carried forward to [redacted], along with additional foreign tax credits from [redacted], resulting in a claimed overpayment for [redacted] of $[redacted].

The Forms 1120X for [redacted] and [redacted] were titled by the taxpayer as "protective claims", even though they did not make a claim for refund, but rather reported additional tax due for each year. The Forms 1120X included the following statement:

"[redacted]."

The Service is in the process of determining the creditable nature of the Dutch SPS tax. If the Dutch SPS tax is ultimately determined not to be creditable, then [redacted]'s refund claim for [redacted] will be disallowed. In this event, the question arises whether [redacted] can reinstate its original election to deduct the Dutch SPS tax for [redacted] and [redacted], as reported on its tax returns.[1]

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[1] The 3-year statute of limitations for [redacted] has been extended under I.R.C. § 6501(c)(4) to [redacted] and, therefore, is still open to allow the taxpayer to file a timely protective claim.

LAW AND ANALYSIS

I.R.C. § 6511(a), generally, provides that a claim for credit or refund of an overpayment of tax must be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later. No credit or refund is allowable unless a timely claim therefor is made. I.R.C. § 6511(b)(1).

A special period of limitations, however, is provided for foreign taxes paid or accrued. I.R.C. § 6511(d)(3)(A) states that if the claim for credit or refund relates to an overpayment attributable to any taxes paid or accrued to any foreign country for which a credit is allowed against the tax pursuant to I.R.C. § 901 or any treaty to which the United States is a party, in lieu of the general 3-year period set forth in § 6511(a), the period of limitations for filing a claim for credit or refund shall be 10 years from the date prescribed by law for filing the return for the year in which such taxes were actually paid or accrued.

With respect to foreign income taxes paid or accrued, a taxpayer has a choice between deducting the taxes or claiming a credit for such taxes under I.R.C. § 901. The choice for any taxable year **may be made or changed** at any time before the expiration of the period prescribed for making a claim for credit or refund for such taxable year. I.R.C. § 901(a). Treas. Reg. § 1.901-1(d), as amended in 1987, indicates that the period of limitations referred to in § 901(a), in which a taxpayer may claim a credit (or claim a deduction in lieu of a foreign tax credit), is the 10-year period specified in I.R.C. § 6511(d)(3)(A).[2]

On [redacted]; [redacted] filed its Forms 1120X as "protective claims" for [redacted] and [redacted]. (b)(7)a [redacted]

[2] Prior to 1987, the Service had ruled in Rev. Rul. 63-248, 1963-2 C.B. 623, that where a taxpayer had taken a deduction on his return for foreign taxes paid, the 3-year period of limitations applied for filing a claim to take a credit for such taxes instead of the deduction. This ruling was rejected in a number of cases, which held that the 10-year period under I.R.C. § 6511(d)(3)(A) applied. See e.g., Hart v. United States, 585, F.2d 1025 (Ct. Cl. 1978).

(b)(7)a [redacted].

It is doubtful, though, whether the Forms 1120X for [redacted] and [redacted] can be deemed to be claims for refund, since they do not report an overpayment of tax nor request a refund, but instead show an additional amount of tax due, which was later assessed and paid. Viewed as formal claims, the Forms 1120X are obviously deficient in that they fail to comply with Treas. Reg. § 301.6402-3(a)(5) which requires that a claim for refund (on Form 1120X for corporations) contain a statement setting forth the amount determined as an overpayment and advising whether such amount shall be refunded to the taxpayer or applied as a credit against estimated income tax for a succeeding taxable year.

For the same basic reason, the Forms 1120X filed for [redacted] and [redacted] can not be deemed to be informal claims. One of the minimum elements of an informal claim is that it puts the Service on notice that the taxpayer is asserting a right to a refund for the taxable year. Mills v. United States, 890 F.2d 1133, 1135 (11th Cir. 1989); American Radiator & Standard Sanitary Corp. v. United States, 318 F.2d 915, 920 (Ct. Cl. 1963)("It is not enough that the IRS has in its possession information from which it might find that the taxpayer is entitled to, or might desire, a refund.")

(b)(7)a [redacted].

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions, please call Attorney Michael A. Yost, Jr. at (412) 644-3441.

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